Supreme Court, U.S.
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No. 92-1528

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

STATE OF OHIO,
Petitioner,

v.

JOHN C. KNUCKLES, SR.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

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CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth and Fourteenth Amendments to the Constitution of the United States which provide, in part:

FIFTH AMENDMENT

> No person *** shall be compelled in any criminal case to be a witness against himself, *** .

FOURTEENTH AMENDMENT

> Section 1. *** No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; *** .

JURISDICTION

For his third reason for granting the writ, Petitioner suggests the instant case presents the issue "whether physical evidence yielded from statements which the Court would deem to be taken in violation of the prophylactic, 'bright-line' rules of **Miranda** or **Edwards** but which were otherwise uncoerced and voluntary must be suppressed as 'fruit of the poisonous tree,'." (Citation omitted). Petition at 18. As indicated below, no Ohio Court has rendered a decision on that issue. As this Court only has jurisdiction to review the final judgment of the highest court of a State, 28 U.S.C. Sec. 1257(a) does not confer jurisdiction in this Court to consider that issue.

STATEMENT OF THE CASE

Respondent accepts Petitioner's statement of the case with the following clarification. Petitioner states "***the two bullets recovered from the victim's head *** were identical mates to the bullet dug from the ground at Respondent's residence." Petition at 5. However, Petitioner neglects to disclose that Petitioner's ballistics expert could not conclusively determine, although he did not rule out the possibility, that the bullets recovered from the victim had been fired from the handgun found in Respondent's car.

SUMMARY OF THE ARGUMENT

The decision of the Ohio Supreme Court rests solidly on precedent of this Court and does not conflict with other state courts of last resort.

The decision of the Ohio Supreme Court did not decide the issue advanced by Petitioner in his third reason for granting the writ. No Ohio Court has rendered a decision on that issue. As this Court only has jurisdiction to review the final judgment of the highest court of a State, 28 U.S.C. Sec. 1257(a) does not confer jurisdiction in this Court to consider that issue.

I.

THE OHIO SUPREME COURT'S DETERMINATION THAT THE STATE VIOLATED RESPONDENT'S RIGHT TO HAVE COUNSEL PRESENT DURING CUSTODIAL INTERROGATION BY CONTINUING THE INTERROGATION AFTER HE HAD UNEQUIVOCALLY INVOKED HIS RIGHT, AND THAT ALL STATEMENTS OBTAINED AS A RESULT OF THE PROHIBITED INTERROGATION WERE INADMISSIBLE DOES NOT CONFLICT WITH DECISIONS OF OTHER STATE COURTS OF LAST RESORT AND RAISES NO QUESTIONS OF FEDERAL LAW WHICH HAVE NOT ALREADY BEEN SETTLED BY THIS COURT.

For its first reason for granting the writ, Petitioner suggests the Ohio Supreme Court "misapplie[d] the concept of 'interrogation' to include any statement or remark of a police officer which 'invited a response'. Petition at 7. Careful review of the Ohio Supreme Court's decision quickly reveals Petitioner's suggestion is unsoundly based on a misinterpretation of **State v. Knuckles**, 65 Ohio St. 3d 494 (1992). A fair reading of the Knuckles decision finds it to be concisely written and completely faithful to this Court's decisions in **Miranda v. Arizona**, 384 U.S. 436 (1966), **Edwards v. Arizona**, 451 U.S. 477 (1981), and **Rhode Island v. Innis**, 446 U.S. 291 (1980).

Petitioner's difficulty in understanding the decision of the Ohio Supreme Court appears to be caused by its examination of portions of the decision out of context. Petitioner relies heavily on the Ohio Supreme Court's language "*** even if the arrest for the bad checks charge had not been a pretext for bringing Knuckles in to talk about Bennett's murder, the statement was still interrogatory in nature. The statement invited a response.", **State v. Knuckles**, 65 Ohio St. 3d at 497, to support its contention that "*** the decision of the Supreme

Court of Ohio misapplie[d] the concept of 'interrogation' to include any statement or remark of a police officer which 'invited a response'". Petition at 7.

In context, the questioned language, read with the preceding paragraph of the decision simply states the Ohio Supreme Court's thorough Edwards analysis, as discussed below at pages 5-7, would remain unchanged even if Respondent's arrest on the bad check warrant was not a pretext for the Bennett murder interrogation.

Again, taking language of the decision out of context, Petitioner states, "Incredibly, the Court below in its decision stated: 'The bright line rule established in these cases eliminates the need for ad hoc determinations by the courts regarding what communications with a defendant are permissible once counsel is requested.'". (Citations omitted). Petitioner, examining the above text from the Ohio Supreme Court Knuckles decision out of context, mistakenly concludes "The Court thus misperceives Edwards' so-called 'bright-line rule' to allow courts to be relieved of any duty to determine, on a case-by-case basis, whether a communication made by police to a defendant who has invoked his right to counsel is interrogation. This abdication of judicial responsibility for determining the Innis question runs afoul of Innis ***." Petition at page 12. Consideration of the questioned text, in context, demonstrates the deficiency in Petitioner's analysis.

In context, the questioned portion of the decision is not subject to Petitioner's interpretation. The two sentences following the questioned portion helps the reader understand the

Knuckles decision. The Ohio Supreme Court explained the "bright-line rule *** eliminates the need for ad hoc determinations by the courts regarding what communications with a defendant are permissible once counsel is requested [by] *** remov[ing] uncertainty by stopping all interrogation. It clearly tells the police what cannot be done." State v. Knuckles, 65 Ohio St. 3d at 497. The Ohio Supreme Court was simply expressing its belief that the bright-line test should eliminate the "need for ad hoc determinations by courts" if the police would simply observe it. This interpretation is consistent with the balance of the opinion where the Ohio Supreme Court acknowledged the relevant decisions of this Court regarding Miranda violations, faithfully applied the decisions to the facts of this case, and held " *** that the statement 'We want to talk to you about Bobby Bennett' was an interrogation prohibited by Edwards." Id. at 497, 605 N.E. 2d, at 55.

The Ohio Supreme Court began its decision with the declaration: "The single issue before the court is whether the statement 'We want to talk to you about Bobby Bennett' is a 'further interrogation' prohibited by Edwards v. Arizona." (citations omitted). Knuckles, 65 Ohio St. 3d at 495. In its decision, the Ohio Supreme Court faithfully observed the Miranda rule: "the United States Supreme Court held that when a defendant requests an attorney, the police must stop interrogation until an attorney is present." Id. at 496. The Ohio Supreme Court then faithfully applied the Innis definition of interrogation. "interrogation' has been defined as including

'any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.'". **Id.** at 496 quoting **Innis**, 446 U.S. 291. Next, the Ohio Supreme Court faithfully discussed **Edwards v. Arizona**, where this Court held "that an accused *** having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." 451 U.S. 477, at 484-485.

Examining the record, the Ohio Supreme Court found Respondent had unequivocally "expressed his desire to deal with the police only through counsel". **Edwards** 451 U.S. at 484-485. Shortly after discovering the death of Bobby Bennett, police began looking for Respondent to question him, because they knew of his relationship with the deceased and because he was seen talking with him prior to the homicide. Respondent was arrested on an outstanding warrant for bad checks. At the police station, Respondent was taken into a closed room by three detectives. As soon as a detective read Respondent his Miranda warnings, Respondent unequivocally requested an attorney, by stating: "I want an attorney".

Examining the record, the Ohio Supreme Court found "counsel [was] not made available to him" and that Respondent did not " *** initiat[e] further communication, exchanges, or conversations

with the police." **Edwards**, 451 U.S at 484-485. With the issue thus narrowed, the Ohio Supreme Court found " *** several factors which required holding that the statement 'We want to talk to you about Bobby Bennett' was an interrogation prohibited by **Edwards**." **Knuckles**, 65 Ohio St. 3d at 496-497.

Contrary to Petitioner's contentions, the Ohio Supreme Court did not " *** abidicat[e] [its] judicial responsibility for determining the **Innis** question" (Petition at 12), did not focus "solely on the fact that the officer's words produced a response" (Petition at 9), did not disregard " *** the actual intent ***" of the police officer (Petition at 9), and did consider the circumstances in which the statement of the police officer was made. The Ohio Supreme Court found the statement of the police officer "We want to talk to about Bobby Bennett" was interrogation because: (1) "*** the only reason Knuckles was arrested was so police could talk to him about Bennett's murder"; (2) the police "*** had no intention of pursuing the bad check charge"; (3) "[t]he statement was more than the 'offhand remarks' in **Innis**"; and the statement was designed to elicit an incriminating response. **Knuckles**, 65 Ohio St. 3d at 497. The Ohio Supreme Court did not expand the **Innis** definition; it simply applied it correctly to the facts of this case.

For this very reason, Petitioner's suggestion that "The Ohio Supreme Court's decision is also in conflict with the decisions of numerous other state courts of last resort *** " (Petition 12-13) is not well taken. As discussed above, Ohio has not "eliminat[ed] the need for case-by-case determinations by the

courts regarding what communications with a defendant are interrogation or its functional equivalent" as claimed by the State at page 13 of its Petition. The Ohio Supreme Court correctly applied **Edwards v. Arizona** and found respondent had unequivocally invoked his right to counsel during custodial interrogation and that the State had violated his constitutional right by continuing interrogation in the absence of counsel. This decision of the Ohio Supreme Court does not conflict with decisions of other state courts of last resort and raises no question of federal law which has not already been settled by this Court.

For these reasons, this Court should deny the petition for writ of certiorari.

II.

THE OHIO SUPREME COURT'S DETERMINATION THAT THE STATE VIOLATED RESPONDENT'S RIGHT TO HAVE COUNSEL PRESENT DURING CUSTODIAL INTERROGATION BY CONTINUING THE INTERROGATION AFTER HE HAD UNEQUIVOCALLY INVOKED HIS RIGHT AND BY CONDUCTING A GUN SHOT RESIDUE TEST DURING THE COURSE OF AN ACTIVE INTERROGATION DOES NOT CONFLICT WITH DECISIONS OF OTHER STATE COURTS OF LAST RESORT OR DECISIONS OF THIS COURT.

The Ohio Supreme Court held "[t]he use of statements made by the defendant after his request for an attorney violated his right under the Fifth and Fourteenth Amendments (as set forth in Edwards, supra) to have counsel present during custodial interrogation." **State v. Knuckles**, 65 Ohio St. 3d 494, 495 (1992). In making this determination, the Ohio Supreme Court characterized the test established by this Court in **Edwards v. Arizona**, 451 U.S. 477 (1981) for dealing with interrogation of defendants who have invoked their right to counsel as a bright-line test. "Simply stated, if a defendant requests counsel, the police must stop all questioning and interrogation immediately." **State v. Knuckles**, 65 Ohio St. 3d at 495.

In **Edwards v. Arizona**, this Court held "that an accused *** having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." 451 U.S. at 484-485. The Ohio Supreme Court correctly applied **Edwards v. Arizona** and found Respondent Knuckles had unequivocally invoked his right to counsel during the custodial interrogation and that the State had violated

his constitutional right by continuing interrogation in the absence of counsel. This decision of the Ohio Supreme Court does not conflict with decisions of other state courts of last resort or decisions of this Court.

For his second reason for granting the writ, Petitioner presents three distinct arguments. First, Petitioner claims the Ohio Supreme Court did not address the issue of whether Respondent's statements made when an officer entered the interrogation room to administer a gun shot residue test during the course of active interrogation were "unsolicited declarations" or a product of the interrogation. Secondly, Petitioner suggests that the administration of the gun shot residue test can be severed from the active interrogation for purposes of the **Edwards v. Arizona** analysis. Thirdly, Petitioner suggests Respondent initiated further communication with the police when the gun shot residue test was administered. None of these arguments are sound.

A.

First, Petitioner posits that the Ohio Supreme Court failed "to address an issue, briefed by the parties and extant in the record herein, involving the Respondent's unsolicited declarations made when the officer entered the room with a kit to swab his hands for gunshot residue." Petition at 15. Petitioner fails to recognize the issue was decided **sub silentio** when the Ohio Supreme Court determined the "unsolicited declarations" were inadmissible because they were obtained during interrogation prohibited by **Edwards**. The Ohio Supreme Court found the

declarations were not unsolicited, but a product of unconstitutional interrogation.

B.

Next, Petitioner attempts to sever the administration of the gun shot residue test from the active interrogation. Petitioner argues the gun shot residue test would have been administered even if Respondent Knuckles' right to counsel during custodial interrogation had been honored; and therefore, the statements Knuckles made during the gun shot residue test were voluntary and unsolicited.

Interestingly, none of the cases relied upon by Petitioner to demonstrate a conflict between the Ohio Supreme Court and other state courts of last resort involve a physical test administered during an active interrogation. In **People v. Pierson**, 670 P. 2d 770 (Colo. 1983), Pierson's request for counsel was scrupulously honored and interrogation had ceased when a barium antimony test was administered. Under those circumstances, the Colorado Court found Pierce's admission that he had fired a gun earlier was admissible. However, the Colorado Court found Pierce's answers to the detective's follow up questions were a product of custodial interrogation and not admissible. The Colorado Court emphasized "We have repeatedly held that once an accused requests counsel all questioning must cease." Id. at 774. In **Day v. State**, 816 S.W. 2d 852 (Ark. 1991) (statement volunteered during weapon frisk), **King v. Commonwealth**, 416 S.E. 2d 669 (Va. 1992) (statement volunteered during collection of forensic samples), and **State v. Boykin**, 432

N.W. 2d 60 (S.Dak. 1988) (statements volunteered during strip search), the physical tests were not administered during the course of active interrogation.

Petitioner may not so easily explain away its violation of Respondent's constitutional right. Respondent's right to have counsel present during custodial interrogation was not honored. The police unconstitutionally continued the interrogation and administered the gun shot residue test during the course of active interrogation. There was no discernible break in the interrogation. Nor, is there an indication in the record of the interrogating officers leaving the room during the test.

Had Respondent's request for counsel been scrupulously honored and had interrogation ceased, as required by **Michigan v. Mosely**, 423 U.S. 96 (1975), Petitioner's argument would be persuasive. "The Fifth Amendment right identified in **Miranda** is the right to have counsel present at any custodial interrogation. Absent such interrogation, there would have been no infringement of the right that [Respondent] invoked***" **Edwards v. Arizona**, 451 U.S. at 485-486. But, Respondent's request for counsel was ignored and the interrogation was unconstitutionally continued. Under these circumstances, the Ohio Supreme Court correctly held that the statements were not admissible against Respondent because they were obtained in violation of **Edwards v. Arizona**. **State v. Knuckles**, 65 Ohio St. 3d at 497.

C.

Finally, Petitioner suggests that "even if **Edwards v. Arizona** had barred any preceding interrogation, the Respondent

himself had 'initiate[d] further communication, exchanges, or conversations with the police,' id., at 484-485, and consequently invited further discussion with the police about this subject matter." Petition at 16-17. Petitioner's suggestion that a valid waiver of an accused's right to have counsel present during custodial interrogation can be established by showing only that he responded to further police-initiated custodial interrogation has been soundly rejected by this Court. "[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." Edwards v. Arizona, 451 U.S. at 484. (Emphasis added).

For these reasons, this Court should deny the petition for writ of certiorari.

III.

TRADITIONALLY, THIS COURT HAS NOT ADDRESSED ISSUES THAT HAVE NOT BEEN RAISED AND RULED UPON IN THE LOWER COURTS.

For his third reason for granting the writ, Petitioner suggests the instant case presents the issue "whether physical evidence yielded from statements which the Court would deem to be taken in violation of the prophylactic, 'bright-line' rules of **Miranda** or **Edwards** but which were otherwise uncoerced and voluntary must be suppressed as 'fruit of the poisonous tree,'." (Citation omitted). Petition at 18. It would be inappropriate for the Court to address this issue since it is not properly before the Court in this case. Under 28 U.S.C. Sec. 1257(a), this Court only has jurisdiction to review the final judgment of the highest court of a State. As indicated below, no Ohio Court has rendered a decision on this issue. **See Fuller v. Oregon**, 417 U.S. 40, 50 n. 11 (1974).

A.

This issue has not been raised in any of the lower courts in this case. At trial, the State of Ohio argued Detective Well's "statement" was not interrogation and the search of the back yard of Respondent Knuckles' residence was consensual. During Respondent Knuckles' appeal to the state court of appeals, Petitioner argued three alternatives: (1) Knuckles statements about firing a handgun were not made during custodial interrogation; (2) Detective Well's "statement" was not interrogation; and (3) Respondent Knuckles expressly limited his right to have counsel present during custodial interrogation to

the bad check charges. During Respondent Knuckles' appeal to the Ohio Supreme Court, Petitioner made a similar three prong argument. Prior to filing its Petition for Writ of Certiorari, the State of Ohio had never raised the issue of the admissibility of the physical evidence yielded from interrogation prohibited by **Edwards v. Arizona** on the basis that Respondent's statements were "otherwise uncoerced and voluntary". Petition at 18. "Ordinarily, this Court does not decide questions not raised or resolved in the lower court." **Youakim v. Miller**, 425 U.S. 231, 234 (1976).

Relying on federal-state comity principles, this Court has held criminal defendants are precluded from raising issues in federal court where those issues were not properly preserved or raised in the state courts. **Wainwright v. Sykes**, 433 U.S. 72 (1977); **Engle v. Isaac**, 456 U.S. 107 (1982); **Murray v. Carrier**, 477 U.S. 478 (1986). The rationale of these decisions should extend to prosecutors who fail to raise an issue at every stage of the proceedings only to raise it, for the first time, in their petition for writ of certiorari in this Court. The prosecutor has waived the federal issue and there is no basis for the assertion of the Court's jurisdiction.

B.

This issue has not been addressed by any of the lower courts in this case. The state court of appeals narrowly decided the **Edwards v. Arizona** issue on the basis of whether Detective Well's statement: "We wanted to talk to you about Bobby Bennett." following Respondent's invocation of his right to have counsel present during custodial interrogation was interrogation. "Since

Edwards requires an end to all questioning and interrogation after the accused invokes his right to counsel, we must decide whether Wells' statement constituted questioning within the meaning of **Miranda**, thereby amounting to a violation of the prohibition against further questioning." **State v. Knuckles** No. CA89-11-159 at 11 (Butler Cty, Ohio Jul. 15, 1991), Petition Appendix at A-21. The state court of appeals held that Detective Wells' statement was not interrogation. Additionally, the state court of appeals held that Respondent's request for counsel during custodial interrogation was expressly limited to the bad check charges. **Id.** at 12, Petition Appendix at A-22.

Similarly, the Ohio Supreme Court decided the instant case narrowly: "The single issue before the court is whether the statement "We want to talk to you about Bobby Bennett" is a "further interrogation" prohibited by **Edwards v. Arizona** (1981), 451 U.S. 477." (parallel citation omitted). **State v. Knuckles**, 65 Ohio St. 3d 494 at 495. The Ohio Supreme Court, applying well-settled precedent of this Court, held that the statement "was an interrogation prohibited by **Edwards**." **Id.** at 497.

Both the Court of Appeals for Butler County, Ohio and the Ohio Supreme Court did not decide the question advanced by Petitioner in his third reason for granting the writ, but decided the case on the narrow grounds of whether Detective Wells' statement "We wanted to talk to you about Bobby Bennett." was interrogation. "Ordinarily, this Court does not decide questions not raised or resolved in the lower court." **Youakim v. Miller**, 451 U.S. 231 (1976).

C.

As the Ohio Supreme Court decided the case on the narrow ground that "***the statement 'We want to talk to you about Bobby Bennett' was an interrogation prohibited by **Edwards**. **State v. Knuckles**, 65 Ohio St. 3d at 497, any opinion issued by this court concerning, to what extent, if any, the physical evidence derived from an interrogation prohibited by **Edwards** is admissible would be purely advisory. Even Petitioner concedes, "The decisions in **Miranda v. Arizona** and **Edwards v. Arizona** require suppression of statements taken in violation of the prophylactic rules set forth in those cases, even if the statements made thereafter are otherwise voluntary under the Fifth and Fourteenth Amendment standards." Petition at 18. Regardless of this Court's opinion in regard to the admissibility of the physical evidence obtained through the unconstitutional interrogation, the Ohio Supreme judgment would be the same. This Court is not permitted to render an advisory opinion. See **Oregon v. Hass**, 420 U.S. 714 at 727 (1975) (Justice Brennan dissenting, joined by Justice Marshall).

For these reasons, the writ for certiorari should be denied.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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